APPENDIX

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 92-3399

ERVIN SHIMMAN,
Plaintiff-Appellant,

v.

FRANK J. MILLER, Individually and as Business Manager and Editor of the Buckeye Engineer, LOCAL UNION No. 18, 18A, 18B, 18C, 18RA and 18G, INTERNATIONAL UNION OF OPERATING ENGINEERS; and LOCAL UNION No. 18, 18A, 18B, 18C, 18RA and 18G, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Defendants-Appellees.

Argued March 25, 1993

Decided June 14, 1993

Rehearing Denied July 27, 1993

Alan Miles Ruben (briefed) and Stephen W. Gard (argued and briefed), Cleveland, OH, for plaintiff-appellant.

William Fadel (argued) and Kathleen M. Sasala (briefed), Wuliger, Fadel & Beyer, Cleveland, OH, for defendants-appellees.

Before: NORRIS and SILER, Circuit Judges; and HOOD, District Judge.*

ALAN E. NORRIS, Circuit Judge.

Plaintiff, Ervin Shimman, appeals the district court's judgment for defendants Frank J. Miller and the International Union of Operating Engineers, Local 18, in this action brought pursuant to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531. We are asked to decide whether defendants' refusal to publish plaintiff's letter to the editor in the union's newsletter violates the free speech provision of the Act, 29 U.S.C. § 411(a)(2).

I.

Out of mounting concern for what it perceived to be a growing trend toward anti-democratic conduct by leaders of some of the nation's labor unions, in 1959 Congress enacted the Labor-Management Reporting and Disclosure Act (the Act). *See* 29 U.S.C. § 401. Among its protections, the Act contains a union member's "Bill of Rights," which guarantees every union member equal voting privileges, rights of free speech and assembly, and a right to bring suit. In its free speech section, the Act provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

> labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2).

In *Knox County Local, Nat'l Rural Letter Carriers' Ass'n v. National Rural Letter Carriers' Ass'n,* 720 F.2d 936 (6th Cir.1984), this court dealt with a claim that § 411(a)(2) had been violated. There, the officers of the national union had negotiated a collective bargaining agreement with the postal service and used the national union's weekly magazine to urge ratification of the agreement. *Id.* at 937. The local union viewed the proposed contract as deficient and attempted to place an advertisement in the magazine that discouraged the agreement's ratification. The national union refused the ad, contending that it would create "internal union strife." *Id.*

This court noted that § 411 "was designed to allow members to participate actively in a 'democratic' union," and that while it did not incorporate the full body of First Amendment law, *see United Steelworkers v. Sadlowski,* 457 U.S. 102, 109, 102 S.Ct. 2339, 2344, 72 L.Ed.2d 707 (1982), a court's inquiry under § 411 is guided by First Amendment free speech principles. *Id.* 720 F.2d at 938-39. We concluded that the advertisement was the type of speech protected by the First Amendment and the Act. Moreover, the national union's refusal to publish the ad was "purely content-based." *Id.* at 940. This was impermissible because the union had " 'opened the forum' of its publication to the commercial speech of its members and of merchants." *Id.* In sum, the court held that § 411(a)(2) prevents "those in 'control' of a *protected, open* and *exclusive* forum of communication from unreasonably refusing to allow co-owners access to that forum based solely upon the *content* of their expression." *Id.* at 941.

II.

The International Union of Operating Engineers, Local 18, represents between 12,700 and 14,000 operating engineers, who operate cranes, hoists, earth movers, and hauling equipment in eighty-five counties in Ohio and four counties in Kentucky. Since the 1950s, the international union has attracted attention to alleged unfair labor practices. Local 18 has experienced internal turmoil as well. Since the 1970s, this court has been called upon to review a number of disputes involving union members' claims for hiring hall discrimination, assaults, and unfair discipline.[1]

Plaintiff has been a member of Local 18 for over forty years, and has spent much of this time as a dissident in his relationship to officers of the local. He also has run for union office.

In 1984, Senator Orrin Hatch convened hearings of the Senate Committee on Labor and Human Resources to investigate charges of employment referral discrimination in the construction trade, with Local 18 being a target of scrutiny. Plaintiff, another Local 18 member, and their lawyer testified about alleged manipulation of the hiring hall by the local for the purpose of discriminating against those who disagreed with the policies of incumbent union leadership.

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[1] *See, e.g., Murphy v. IUOE, Local 18,* 774 F.2d 114 (6th Cir. 1985) (dissident recovers for work referral discrimination, unfair discipline, intimidation, and physical violence), *cert. denied,* 475 U.S. 1017, 106 S.Ct. 1201, 89 L.Ed.2d 315 (1986); *Shimman v. Frank,* 625 F.2d 80 (6th Cir.1980) (plaintiff's brother beaten at union meeting), later proceeding, *Shimman v. IUOE, Local 18,* 744 F.2d 1226 (6th Cir.1984) (en banc), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985); *NLRB v. IUOE, Local 18,* 500 F.2d 48 (6th Cir.1974) (court enforces NLRB finding of violations of National Labor Relations Act for threatening members with loss of employment for opposing incumbent leadership). Miller was also a defendant in the *Murphy* case. *See Murphy,* 774 F.2d at 119.

During this time, defendant Miller was business manager of Local 18 and editor of the local's newsletter, the *Buckeye Engineer.* When Miller became aware of the Hatch hearings, he published an article in the April 1984 issue of the *Buckeye Engineer* informing members that the "notorious anti-union senator, right-wing Republican Orin [sic] Hatch" recently had presided over hearings that were "neither fair nor impartial." In addition, Miller reported that

> [t]wo members of Local 18 were permitted to testify as was a lawyer representing members suing Local 18. Although the committee was notified in advance, Local 18's lawyer was not permitted to testify or present documents which would have clearly shown that the allegations and accusations were false or misleading. Most of the events giving rise to the allegations made by the two Local 18 members occurred in the late 1960's and mid-1970's, all of which have been litigated in the courts and are still pending on appeal.

Plaintiff interpreted this article as attacking him and responded with a letter to the editor. The letter explained the nature of the hearings and the allegations made before the committee and pointed out that Miller had declined the committee's invitation to testify. Plaintiff concluded with a request that his letter be published in the *Buckeye Engineer,* "so I too can get the truth before all the members of Local 18." Miller refused to print the letter. As his deposition testimony makes clear, the only reason for this refusal was that he disagreed with the letter's content.

Plaintiff filed suit in federal district court against Miller and Local 18, alleging that the refusal to publish his letter violated the free speech rights embodied in § 411(a)(2). In addition, he charged that there is no economically feasible alternative method by which to disseminate his message because few members attend meet-

ings and no member is permitted to obtain the union mailing list. He requested the court to require Miller to pay damages, order defendants to print his letter to the editor responding to Miller's April 1984 article in the newsletter, and require defendants to adopt neutral procedures for allowing publication of members' views.

In April 1985, this district court dismissed the complaint for failure to state a claim, and in March 1986, this court reversed, holding that plaintiff had adequately stated a claim for relief.

On remand, after the case had been submitted to the court upon the record, the district court in March 1992 entered judgment for Local 18.[2] The court held that the union had not opened the *Buckeye Engineer* to the opinions of its members as required by *Knox County*. According to district court, Miller, as editor, had the discretion to select what articles were printed. Therefore, his refusal to publish plaintiff's letter was not an unreasonable act of censorship in derogation of any rights to free speech which plaintiff might enjoy under the Act. The district court further concluded that the relief requested would result in an unjustified interference with internal union affairs, and also indicated that plaintiff may have failed to exhaust his intra-union remedies. Plaintiff appeals these rulings.

III.

Local 18 asserts that this court should not hear the appeal because plaintiff failed to pursue his remedies within the union before filing suit. *See* 29 U.S.C. § 411 (a)(4). We disagree. The union has not cited any pertinent remedies in its bylaws for the refusal to print a letter in the union newsletter. *See Verville v. International Ass'n of Machinists & Aerospace Workers*, 520 F.2d 615, 620 (6th Cir.1975) (exhaustion under § 411

[2] Miller died during the pendency of this case.

(a)(4) not required when union remedies are inadequate); *see also Keeffe Bros. v. Teamsters Local 592*, 562 F.2d 298, 303 (4th Cir.1977) ("a free speech violation generally justifies dispensing with administrative remedies"). Accordingly, this court has jurisdiction to hear plaintiff's appeal.

IV.

In order to determine if Miller's refusal to publish plaintiff's letter violated the Act, we must ascertain whether the *Buckeye Engineer* was such a "*protected, open* and *exclusive* forum of communication" that Miller was prohibited from "unreasonably refusing to allow co-owners access to that forum based solely upon the *content* of their expression." *Knox County*, 720 F.2d at 941.

Initially, we note that since members have no access to the local's mailing list, the *Buckeye Engineer* is the exclusive means of communication for members wishing to present an alternate point of view to other union members. Moreover, member dues are the sole source of financing for the newsletter. As in *Knox County*, therefore, the publication is literally " 'owned' in equal shares by the members whose union dues finance [it]." *Id.* at 940. Finally, it is clear from the record that Miller's rejection of plaintiff's letter was entirely content-based.

Consequently, we are left with the question whether Miller and Local 18 had " 'opened the forum' of its publication" so that they were required to print plaintiff's letter in the *Buckeye Engineer*. *Id.* After a thorough review of the record, we conclude that, under the unique facts of this case, they had. We therefore reverse the judgment of the district court.

The record shows that on occasion Miller used the publication to defend against what he viewed as attacks by critics of Local 18, or, in a broader sense, challenges by legislators to the labor union movement in general. An example, of course, is Miller's April 1984 article dismissing as without foundation a congressional inquiry

into charges that the local was engaging in discriminatory practices.

In addition, the newsletter regularly ran articles authored by then-Ohio Governor, Richard Celeste. The articles touted various programs of the Celeste administration that were favorable to organized labor, in a one-sided manner reminiscent of an advertisement by a candidate for political office.

Moreover, in 1986 the newsletter printed an anonymous letter from "A Brother Engineer" denouncing the reform efforts of union rebels. The letter stated:

> This local Union, along with all organized labor, is being attacked from many sides. No longer are we able to form ranks as we have in the past.
>
> Our foes are far too subtle for that. Instead, they use unfair legislation, twist the meaning of existing law to serve their own purposes and use every device possible to tear down and destroy what we all have worked so hard for, for so long.

The letter concluded by urging members to support Miller, both morally and monetarily, so that he would have a "fighting chance." [3]

What these examples reveal is an informal policy by those in charge of the *Buckeye Engineer* to use it as a platform for the opinions of individuals who supported Local 18's incumbent management and its views. To permit those leaders consistently to promote one point of view on internal union disputes, while effectively

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[3] Local 18 insists that this was not a letter from an actual union member but was merely "a draft created solely for the Union administration to communicate with the membership as a whole." However, the fact that the union generated an anonymous letter to encourage support for Miller, far from suggesting that the *Buckeye Engineer* was not an open forum, actually strengthens plaintiff's claim that he should have an opportunitiy to present an opposing viewpoint.

silencing the opposition by withholding the only feasible channel of communication, would contravene the Act's overriding objective of promoting union democracy.

Accordingly, we conclude that the *Buckeye Engineer* was an "open forum" for the discussion of union issues, within the meaning of *Knox County,* to the extent that plaintiff should have been permitted to respond to Miller's article criticizing plaintiffs action in speaking out against union management.

We decline, however, to frame a remedy as broad as plaintiff requests. On the basis of the record in this case, we would not be warranted in ordering the *Buckeye Engineer* to adopt general procedures accommodating the publication of members' views, because at this point such a broad prospective order would amount to an unjustifiable judicial interference with internal union affairs. This record does not reveal a pattern or magnitude of violation of the Act that would warrant such judicial intervention at this time. Our holding, that the *Buckeye Engineer* was required to print plaintiffs letter, adequately places defendants on notice that they must comply in the future with their obligation to accommodate free discussion by members in the pages of that publication. Accordingly, this cause is remanded to the district court for entry of an order directing defendants to print plaintiff's letter in its entirety, and, in view of plaintiff's success in this action having rendered a substantial service to his union as an institution and to all of its members by vindicating his own right of free speech as guaranteed by the Act, to consider an award of reasonable attorney's fees as prayed for by plaintiff. *See Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

V.

The judgment of the district court is reversed, and this cause is remanded to that court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. C84-3140

ERVIN SHIMMAN,
Plaintiff,

v.

FRANK J. MILLER, *et al.*,
Defendants.

ORDER

[Filed March 30, 1992]

THOMAS D. LAMBROS, CHIEF JUDGE

This case was submitted for trial on the record before the undersigned Judge, with the parties agreeing to submit as evidence of trial all exhibits marked and identified with both parties' summary judgment motions. The parties further stipulated that the briefs in support of said summary judgment motions are to be treated as trial briefs. At the request of defendants, the parties were given thirty day to file proposed findings of fact and conclusions of law.

Although all four Counts of plaintiff's Complaint were briefed in the cross-motions for summary judgment, plaintiff subsequently filed a motion for dismissal of Counts I, III and IV. On August 30, 1991, this Court dismissed and terminated said Counts. The issue to be decided in Count II of the Complaint whether "the facts of the instant case amount to a violation of the LMRDA as defined by *Knox*" (Defendant's Brief in Opposition, p. 2;

See also Plaintiff's Reply to Defendant's Brief in Opposition, p. 2). Specifically, the issue addressed in Count II of the Complaint is whether the Union's refusal to publish plaintiff's letter in the Union newspaper, the *Buckeye Engineer,* of which defendant Miller was the editor, violates the right to free speech as guaranteed under 29 U.S.C. § 411(a)(2). On September 11, 1991, defendant Frank Miller filed a motion to dismiss party Frank Miller who is now deceased. Said motion is hereby granted and defendant Frank Miller is dismissed from this action.

Plaintiff had testified before the Committee on Labor and Human Resources of the United States Senate. Subsequently, the following article appeared in the *Buckeye Engineer*:

> Recently Local 18 received a letter from the Senate Committee on Labor and Human Resources asking Local 18 to appear and testify. Please understand, contrary to allegations, Local 18 is not under investigation. This Senate Committee was only taking testimony for proposed labor legislation.
>
> The notorious anti-union senator, right-wing Republican Orin Hatch from Utah, conducted the hearings in absence of other committee members, with the exception of brief appearances by two fellow conservative Republicans. The hearings were neither fair nor impartial.
>
> Two members of Local 18 were permitted to testify as was a lawyer representing members suing Local 18. Although the committee was notified in advance, Local 18's lawyer was not permitted to testify or present documents which would have clearly shown that the allegations and accusations were false or misleading. Most of the events giving rise to the allegations made by the two Local 18 members occurred in the late 1960's and mid-1970's, all

of which have been litigated in the courts and are still pending on appeal.

Plaintiff subsequently wrote a letter to defendant Miller responding to the article in the *Buckeye Engineer* and requesting that the contents of the letter be published in a later issue of said newsletter. Plaintiff's letter states:

> I appeared before the Senate Committee on Labor and Human Resources of which you in your "Report to the Members" in the April 1984 issue of the Buckeye Engineer called this a Anti-Union Senate hearing.
>
> The truth is this hearing was held for the allegations of corruption in the I.U.O.E. of Louisiana Local 406 and Ohio Local 18.
>
> Testimony was given not just of happenings in the past but right up to the present day.
>
> Testimony was given as to the manipulation of the Referral by friends and relatives of Business Agents and Officers of Local 18. Local 18 continues to discriminate in favor of Business Agents and Officers' friends and relatives.
>
> Officers and Agents continue to try to remove members off their jobs.
>
> Business Manager Miller was invited to testify but declined.
>
> Local 18 counsel William Fadel, was offered to present material to the Committee but never did.
>
> Testimony was given as to the articles in the Buckeye Engineer being one-sided.
>
> As you being the editor, I am asking you to print this article so I too can get the truth before all the members of Local 18.
>
> Member of 38 years in Local 18.

Defendants declined to publish plaintiff's letter on the ground that the Buckeye Engineer, pursuant to policies established by the duly elected Executive Board, has not been opened up to the speech of either members or merchants inasmuch as it does not publish either paid advertisements or editorial opinions of its members. Plaintiff alleges that by publishing the column and refusing to publish his letter, defendants violated various provisions of the Labor Management Reporting and Disclosure Act.

Specifically, plaintiff asserts in Count II of the Complaint that defendants' refusal to publish plaintiff's letter violates his right to free speech as guaranteed by 29 U.S.C. § 411(a)(2). Section 411(a)(2) states:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Plaintiff relies on *Knox County Local, National Rural Letter Carriers Assoc. v. National Rural Letter Carriers' Assoc.*, 720 F.2d 936 (6th Cir. 1983) to support his position that the Labor Management Reporting and Disclosure Act ("LMRDA") requires a union to publish the views of its members in the union newspaper. In *Knox*, the Sixth Circuit stated that "Prevailing First Amendment principles therefore prevent those in 'control' of a protected, open and exclusive forum of communication from

unreasonably refusing to allow co-owners access to that forum based solely upon the content of their expression." *Knox,* 720 F.2d at 941. The Court in *Knox* found that the national union had "opened the forum" of its publication by accepting the commercial speech of its members and of merchants. Having opened its magazine to its members and to outside merchants, which effectively opened the forum to the public, the court concluded that the national union could not unreasonably preclude advertisements submitted by its members based on their content. *Knox,* 720 F.2d at 940.

Unlike the magazine in *Knox,* the *Buckeye Engineer* does not accept any ads. *See Murphy v. Intern. Union of Operating Engineers,* 774 F.2d 114, 132 (6th Cir. 1985). Furthermore, as the *Buckeye Engineer,* pursuant to policies established by the duly elected Executive Board, does not publish editorial opinions of its members, it has not opened up to the speech of either merchants or members of the union. In view of Local 18's policy of not using the *Buckeye Engineer* as a "public forum," what articles are published lies within the discretion of the Union's Business Manager. *Knox, supra*; *Sheldon v. O'Callaghan,* 497 F.2d 1276 (2nd Cir. 1974), *cert. denied,* 419 U.S. 1090 (1974); *Members for a Democratic Union v. Local 1011, Communications Workers of America, AFL-CIO,* 697 F.Supp. 771 (S.D.N.Y. 1987); and *Roman v. New York State Teachers,* 655 F.Supp. 422 (S.D.N.Y. 1987). Therefore, defendants' refusal to publish plaintiff's letter does not constitute an unreasonable act of censorship in derogation of plaintiff's rights under § 411(a)(2).

Defendant Frank J. Miller, as Business Manager of Local 18, was also the Editor of the *Buckeye Engineer* and was directed in his administration thereof by policies laid down by the Local Union's Executive Board. *See* Article XXIX Section 2 of Local 18's By-Laws. Pursuant to the internal complaint procedures set forth in Article XXII of Local 18's By-Laws, plaintiff, before filing this

lawsuit, should have first brought his complaint to the District Representative, second, to the District Advisory Board, third, to the Business Manager and fourth, to the Executive Board. A granting of plaintiff's relief by this Court would in essence make this Court the Editor of the *Buckeye Engineer,* which would result in "unjustified judicial interference with internal union affairs." *Murphy,* 774 F.2d at 132; *Knox,* 720 F.2d at 939.

Accordingly, because the *Buckeye Engineer* has not been opened as a "public forum," what articles are published lies not within the judgment of this Court, but rather within the discretion of the Union's Business Manager. Defendants' refusal therefore to publish plaintiff's letter does not constitute an unreasonable act of censorship in derogation of plaintiff's rights under § 411(a)(2). Judgment is hereby entered in defendants' favor. This case is dismissed and terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

At Cleveland, Ohio
Dated: March 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-3399

ERVIN SHIMMAN,
Plaintiff-Appellant,

v.

FRANK J. MILLER, ETC., *et al.*,
Defendants-Appellees.

ORDER

[Filed July 27, 1993]

BEFORE: NORRIS and SILER, Circuit Judges; and HOOD,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE
COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Joseph M. Hood sitting by designation from the Eastern District of Kentucky.